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ENGQUIST v. OREGON DEPARTMENT OF AGRICULTURE: NO HARM MEANT? THE VANQUISHED REQUIREMENT OF ILL-WILL IN CLASS-OF-ONE EQUAL PROTECTION CLAIMS AND THE EROSION OF PUBLIC EMPLOYEES' CONSTITUTIONAL RIGHTS

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In *Engquist v. Oregon Department of Agriculture*,[1] the Supreme Court of the United States considered whether a public employee could bring an Equal Protection claim on the basis that she was treated differently from similarly situated employees for purely vindictive or malicious reasons.[2] The Court held that a class-of-one Equal Protection claim is not valid in the public employment context.[3] In so holding, the Court refused to recognize public employees' constitutional right to be protected from maliciously discriminatory government actions.[4] This Note will argue that, rather than categorically rejecting all class-of-one Equal Protection claims in the public employment context, the Supreme Court should have instead adopted a stringent test requiring public employees to show they were: (1) intentionally treated differently from other similarly situated persons; (2) for malicious or vindictive reasons; and (3) for no rational reason.[5] Class-of-one claims fit with the Court's prior willingness to expand the scope of Equal Protection and the Court's emphasis on individual rights.[6] Class-of-one claims should not be completely excluded from public employment because no constitutional right has ever been completely excluded from the public employment context, and the Supreme Court has never allowed employers to subject public employees to unreasonable working conditions.[7] Finally, the requirement that plaintiffs prove ill-

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1. 128 S. Ct. 2146 (2008).
2. *Id.* at 2148.
3. *Id.* at 2148–49.
4. *See id.* at 2157.
5. *See infra* Part IV.C.
6. *See infra* Part IV.A.
7. *See infra* Part IV.B.

will is the key to a workable class-of-one claim in the public employment context.[8] This test is narrow enough to prevent the flood of litigation that the Supreme Court fears will occur, while still allowing individual public employees in truly unique and outrageous circumstances to assert their constitutional right to freedom from discriminatory treatment by government actors.[9]

I. THE CASE

In 1992, Anup Engquist was hired by the Oregon Department of Agriculture ("ODA") laboratory, Export Service Center ("ESC").[10] While working for the ESC, Engquist constantly clashed with her fellow employee, John Hyatt, and complained to her supervisor that Hyatt "made her life difficult."[11] Engquist's supervisor responded to these complaints by sending Hyatt to diversity and anger management training.[12] In June 2001, John Szczepanski became the new director of ESC.[13] Shortly thereafter, Szczepanski told a client that he could not deal with Engquist, and that he was going to have Engquist discharged.[14] Hyatt also told a co-worker that he and Szczepanski were attempting to "get rid of" Engquist.[15] Szczepanski then chose Hyatt over Engquist for a promotion despite Engquist's higher qualifications.[16] In October 2001, the Governor of Oregon called for budget reductions in the state government.[17] On January 31, 2002, Szczepanski eliminated Engquist's position and gave her the choice of being demoted or leaving the ESC.[18] Engquist refused the demotion and lost her job.[19]

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8. *See infra* Part IV.C.

9. *See infra* Part IV.C.

10. Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2149 (2008).

11. *Id.* Engquist specifically charged Hyatt with "excessively monitor[ing]" her and making false claims about her. Engquist v. Or. Dep't of Agric., 478 F.3d 985, 990 (9th Cir. 2007).

12. *Engquist*, 128 S. Ct. at 2149.

13. *Id.*

14. *Id.*

15. *Engquist*, 478 F.3d at 990.

16. *Id.* at 990–91. Specifically, Engquist had two master's degrees in laboratory sciences, while Hyatt had only a bachelor's degree in biology. Engquist v. Or. Dep't of Agric., Civil No. 02-1637-AS, 2004 U.S. Dist. LEXIS 18844, at *6 (D. Or. Sept. 14, 2004). Engquist also had more customer service experience, but Szczepanski explained that he chose Hyatt because Hyatt had a stronger background in business and chemistry. *Engquist*, 478 F.3d at 990–91.

17. *Engquist*, 478 F.3d at 991.

18. *Engquist*, 128 S. Ct. at 2149. Engquist was given this choice in accordance with her collective bargaining agreement. *Id.*

19. *Id.*

Engquist brought suit in the United States District Court for the District of Oregon against the ODA, Szczepanski, and Hyatt, alleging, *inter alia*, that the defendants violated the Equal Protection Clause of the Fourteenth Amendment by discriminating against Engquist on the basis of race, sex, and national origin.[20] Engquist also claimed that Szczepanski and Hyatt unlawfully targeted her as a class-of-one[21] for "arbitrary, vindictive, and malicious reasons."[22] After the defendants moved for summary judgment, the district court determined that Engquist's class-of-one claim was cognizable, provided that Engquist could prove that the defendants spitefully tried to punish her for personal reasons unrelated to the government's objectives and that the defendants treated her differently from other employees with similar positions and experience.[23] The jury found in favor of Engquist on the basis of her class-of-one action and several other claims, and awarded her a total of $425,000 in compensatory and punitive damages.[24] The defendants appealed.[25]

The United States Court of Appeals for the Ninth Circuit rejected the validity of a class-of-one claim in the public employment context.[26] Distinguishing Engquist's case from Supreme Court precedent favoring class-of-one plaintiffs, the Ninth Circuit determined that a class-of-one claim was not legally valid in the public employment context because it would unduly interfere with state employment practices and nullify public at-will employment.[27] Judge Reinhardt dissented, following the reasoning of circuits favoring class-of-one employment

20. *Id.* In addition to her Equal Protection Clause claims, Engquist also claimed violations of federal anti-discrimination laws, the Due Process Clause of the Fourteenth Amendment, and state law. *Id.*

21. A class-of-one Equal Protection claim alleges discrimination directed against one's individual characteristics, rather than membership in a group such as race or gender. *Id.*

22. *Id.* (citation and internal quotation marks omitted).

23. Engquist v. Or. Dep't of Agric., Civil No. 02-1637-AS, 2004 U.S. Dist. LEXIS 18844, at *14 (D. Or. Sept. 14, 2004). Although the court rejected several of Engquist's claims at summary judgment, all of the equal protection claims went to trial. *Id.* at *2.

24. *Engquist*, 128 S. Ct. at 2149–50. The damages included $175,000 in compensatory damages and $125,000 in punitive damages for the Equal Protection violation. *Id.* at 2150.

25. *Id.* at 2150.

26. *Id.*

27. *Id.* Specifically, the Ninth Circuit analyzed the leading class-of-one discrimination case, *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), which acknowledged the validity of a class-of-one claim in challenging state legislative and regulatory action. Engquist v. Or. Dep't of Agric., 478 F.3d 985, 992 (9th Cir. 2007) (citing Vill. of Willowbrook v. Olech, 528 U.S. 562, 564–65 (2000) (per curiam)). The Court of Appeals distinguished the public employment context of *Engquist* from the administrative context of *Olech*, arguing that the government has more discretion in the employment context to allow for differential treatment of individuals. *Id.* at 995.

claims.[28] The Supreme Court granted certiorari to determine if a class-of-one discrimination claim is a valid legal claim in the public employment context.[29]

II. LEGAL BACKGROUND

The Fourteenth Amendment of the United States Constitution prohibits any state from denying "any person within its jurisdiction the equal protection of the laws."[30] Since the ratification of the Fourteenth Amendment, the Supreme Court has slowly broadened its understanding of the scope of the Equal Protection Clause.[31] Although Equal Protection plaintiffs most frequently allege discrimination based on membership in a vulnerable group, the Supreme Court has long implied and recently declared that a class-of-one claim brought by an individual that does not assert group membership is valid.[32] The Supreme Court has also held that the Equal Protection Clause, like every other constitutional guarantee, applies in the public employment context.[33] Finally, the Supreme Court has consistently emphasized the importance of underlying ill-will or malicious intent in Equal Protection analysis.[34]

A. *The Trend to Widen the Scope of the Equal Protection Clause Led the Supreme Court to Validate Class-of-One Claims in* Village of Willowbrook v. Olech

In 1866, Congress drafted the Fourteenth Amendment in response to the slew of laws passed diminishing African-Americans' rights following the Civil War.[35] The language of the Equal Protection Clause, however, does not limit its protections to this specific group.[36]

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28. *Id.* at 1010 (Reinhardt, J., dissenting). Similar to what this Note will argue, Judge Reinhardt conceded that courts must cautiously apply a higher standard of review for class-of-one claims than for suspect class claims, but insisted that Supreme Court precedent supports applying all discriminatory government action to some rational basis review. *Id.* at 1011.

29. *Engquist*, 128 S. Ct. at 2150.

30. U.S. CONST. amend. XIV, § 1.

31. *See infra* Part II.A.

32. *See infra* Part II.B.

33. *See infra* Part II.B.

34. *See infra* Part II.C.

35. *See Ex parte* Virginia, 100 U.S. 339, 344–45 (1880) ("One great purpose of [the Fourteenth Amendment] was to raise [African-Americans] from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States.").

36. Rather, the Equal Protection Clause uses the broad phrase "any person." U.S. CONST. amend. XIV, § 1.

Although courts give the most deference to plaintiffs bringing claims of discrimination based on race or national origin, courts apply the Equal Protection Clause to many different types of discriminatory claims under a three-level standard.[37] While the Supreme Court has long recognized that the Equal Protection Clause protects individuals,[38] it explicitly recognized class-of-one claims for the first time in the late twentieth century.[39]

1. Expanding Discriminatory Realities: The Emergence of the Tri-Level Standard for Equal Protection Claims

Although early Equal Protection litigation mainly focused on attacking racially discriminatory statutes,[40] the immense success of *Brown v. Board of Education*[41] and other civil rights litigation inspired plaintiffs to bring a host of Equal Protection claims expanding beyond racial classifications, and the Court eventually acknowledged that the Equal Protection Clause applies in all contexts.[42]

Over time, the Supreme Court adopted three hierarchical categories for Equal Protection analyses: strict scrutiny, intermediate scrutiny, and rational basis scrutiny.[43] Courts apply strict scrutiny to classifications involving a suspect class (such as race or national origin) or a fundamental right protected by the Constitution (such as religion).[44] Classifications based on those categories are rarely necessary to achieve any legitimate state interest and are most likely to be grounded in prejudice.[45] Under strict scrutiny, the classification or differential treatment must be narrowly tailored to serve a compelling government interest[46] and is almost always struck down.[47]

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37. *See infra* Part II.A.1.

38. *See infra* Part II.A.2.

39. *See infra* Part II.A.3.

40. Most famously, the landmark case *Brown v. Board of Education* held that state laws creating racially segregated schools violated the Equal Protection Clause. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

41. 347 U.S. 483.

42. Cooper v. Aaron, 358 U.S. 1, 17 (1958) (declaring that the Equal Protection Clause extends to all state actions, "whatever the agency of the State taking the action . . . or whatever the guise in which it is taken" (citations omitted)).

43. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439–42 (1985) (describing the modern three-prong equal protection analysis and the supporting jurisprudence).

44. *Id.* at 440.

45. *Id.*

46. *Id.*

47. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting).

Courts apply an intermediate standard of scrutiny for certain other critical classifications, particularly gender.[48] Intermediate scrutiny only requires courts to find that the classification or differential treatment is significantly related to an important governmental objective.[49]

Courts apply rational basis scrutiny for all other Equal Protection claims, including cases involving disabilities,[50] age,[51] and sexual orientation.[52] Under rational basis scrutiny, the government must only prove that its act rationally furthers a legitimate government purpose.[53] The court has significant discretion, and may require the plaintiff to negate every conceivable basis that might support the challenged classification or action,[54] or may refuse to hypothesize rational justifications not posited by the defendant.[55] Once the government asserts a rational basis for its conduct, the plaintiff must show that the classification is only a pretext for an illegitimate purpose.[56] Courts rarely overturn government acts under the rational basis test unless those acts clearly stem from a fear or dislike of the people toward whom the act is directed.[57]

Although the Supreme Court emphasized the importance of group classifications when considering facially discriminatory statutes, it did not entirely exclude consideration of individual rights.[58] In-

48. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996) (declaring that parties who seek to defend a gender-based classification must provide an "exceedingly persuasive justification" (internal quotation marks omitted)).

49. *See Cleburne*, 473 U.S. at 441.

50. *Id.* at 442.

51. *See, e.g.*, *Murgia*, 427 U.S. at 312 (upholding a law requiring mandatory retirement at the age of fifty for state police officers because it was reasonably connected to a governmental purpose of physically fit police officers).

52. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631–32 (1996) (using the rational basis test to evaluate a law prohibiting the legislature from passing any laws specifically protecting homosexuals).

53. *Murgia*, 427 U.S. at 314.

54. FCC v. Beach Comm., Inc., 508 U.S. 307, 313 (1993).

55. *See, e.g.*, *Romer*, 517 U.S. at 631–32 (refusing to hypothesize rational reasons for a state amendment prohibiting laws specifically protecting homosexuals).

56. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–36 (1973) (finding that the legislature's official purpose of preventing social security fraud through restricting social security access was only a pretext for targeting "hippies").

57. *See Romer*, 517 U.S. at 632 (finding that a constitutional amendment purporting to remove homosexuals or bisexuals from the protection of special state laws was unconstitutional because it implied animosity toward the group); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (finding that a zoning ordinance preventing mentally retarded persons from living in a group home facility was unconstitutional because the requirement was motivated by a mere dislike of the group).

58. *See* Shelley v. Kraemer, 334 U.S. 1, 22 (1948) (emphasizing individual rights in a lawsuit challenging a law classified by race).

deed, the Court clearly affirmed the importance of individual rights in *Shelley v. Kraemer*,[59] when it addressed whether a racially restrictive covenant was valid if it applied equally to blacks and whites.[60] There, the Court stated that the rights established by the Equal Protection Clause are "by its terms, guaranteed to the individual" and are "personal rights."[61]

2. *The Supreme Court Has Long Recognized That the Equal Protection Clause Protects Individuals*

In addition to expanding its protection of groups targeted by facially discriminatory laws, the Supreme Court also gradually expanded its protection of individuals targeted by selective enforcement or arbitrary administration of facially neutral laws and administrative decisions.[62] Although some of the strongest rhetoric for individual rights emerged in cases involving covert segregation of minorities after the denouncement of official segregation,[63] the emphasis on individual Equal Protection rights began in the late nineteenth century.[64]

In 1879, in *Missouri v. Lewis*,[65] the Supreme Court considered whether a plaintiff had a valid Equal Protection claim when he was denied access to the Missouri Supreme Court after the state set up a separate appellate court system for several counties, including the plaintiff's county of residence.[66] The Court found that the Equal Protection Clause allows for differing laws among jurisdictions, as long as the government does not discriminate among anyone within those jurisdictions.[67] In its holding, the Court emphasized that individuals, as well as classes of people, should have the same legal protection as all other similarly situated individuals or groups.[68]

Seven years later, in *Yick Wo v. Hopkins*,[69] the Court underscored the protectiveness of individual rights when it held that a government

59. 334 U.S. 1.

60. *Id.* at 22.

61. *Id.*

62. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (holding that the government could not deny businesses licenses to applicants based on their national origin).

63. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 341–42 (1960) (holding that a rezoning law that effectively eliminated blacks from the city zone by creating an oddly shaped twenty-eight-sided zone clearly had a segregationist purpose).

64. *See, e.g.*, Missouri v. Lewis, 101 U.S. 22, 31 (1880) (emphasizing Equal Protection rights for individuals as well as groups).

65. 101 U.S. 22.

66. *Id.* at 29.

67. *Id.* at 30.

68. *Id.* at 31.

69. 118 U.S. 356 (1886).

act could violate the Equal Protection Clause even if it did not arise from legislation blatantly targeting a suspect class.[70] In *Yick Wo*, a law prohibited laundry businesses in wooden buildings unless the board of supervisors granted permission to the owner.[71] Although the law was neutral on its face, the board of supervisors applied the law in a discriminatory manner, denying all 200 Chinese applicants permission while granting permission to white applicants.[72] The Court reasoned that because the Chinese applicants had complied with the same standards as the other applicants, and the board of supervisors could show no legitimate reason for the distinction between the applicants, the board must have been motivated by an illegitimate hostility towards the petitioners:[73] Thus, its denial of permission to Chinese applicants, though purportedly discretionary, was unconstitutional.[74]

While the Court found the selective administration in *Yick Wo* to be targeted against a suspect class,[75] many selective or arbitrary enforcement cases involved plaintiffs who did not did not fit neatly into minority group classifications.[76] For example, in the 1944 case of *Snowden v. Hughes*,[77] the Supreme Court found that a politician who did not fit into any suspect class could have a valid Equal Protection claim.[78] The law provided that the top two Republican candidates for an election should be placed on the nomination ticket, and the plaintiff had received the second highest number of Republican votes.[79] When the Illinois State Election Board nevertheless failed to nominate him, the plaintiff claimed the Board had intentionally and maliciously discriminated against him.[80] The Court, however, found that the failure of the Election Board to certify the candidate was not a violation of the Equal Protection Clause because the statute permissibly distinguished between successful and unsuccessful political candidates, and the official actions merely applied the statute erroneously.[81] The Court stated that if the plaintiff had shown that the board had meant to discriminate against him as an individual, or

70. *Id.* at 373–74.
71. *Id.* at 368.
72. *Id.* at 374.
73. *Id.*
74. *Id.*
75. *Id.* at 368.
76. *See, e.g.*, Snowden v. Hughes, 321 U.S. 1, 3–4 (1944) (considering the Equal Protection rights of an individual politician).
77. 321 U.S. 1.
78. *Id.* at 8.
79. *Id.* at 3–4.
80. *Id.* at 4.
81. *Id.* at 8.

was purposefully designed to favor another candidate, then the Court would have found an Equal Protection violation.[82]

The greatest foreshadowing of explicit class-of-one language occurred in selective enforcement tax cases.[83] In 1923, the Supreme Court in *Sioux City Bridge Co. v. Dakota County*[84] held that an individual bridge company could not be taxed at 100% of its property value when all other taxpayers in the county were taxed on a lower percentage of their property value.[85] Without attempting to place the bridge company into any hypothetical class, the Court declared that the Equal Protection Clause must guard every person from intentional and arbitrary discrimination furthered by the improper execution of the law.[86] In an almost identical case more than half a century later, *Allegheny Pittsburgh Coal Co. v. Commission of Webster County*,[87] the Supreme Court inched even closer to explicit class-of-one language when it reaffirmed that intentional discriminatory undervaluation of property violates the "constitutional right of one" who was taxed on the full property value.[88]

3. Explicit Recognition of Class-of-One Claims

Explicit class-of-one Equal Protection claims emerged in the lower federal courts in the late twentieth century.[89] As an outgrowth from the selective and arbitrary enforcement cases, class-of-one claims pushed individual rights to the forefront of a claim, allowing an individual plaintiff to bring a claim of government discrimination apart from any group classification, and in more subjective contexts than prior selective discrimination cases.[90]

Beginning in the 1980s, the First and Second Circuits stretched the limits of group classifications by treating individuals who were in-

82. *Id.*

83. *See, e.g.*, Twp. of Hillsborough v. Cromwell, 326 U.S. 620, 623 (1946) (holding that the Equal Protection Clause "protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class").

84. 260 U.S. 441 (1923).

85. *Id.* at 445–46.

86. *Id.* at 445.

87. 488 U.S. 336 (1989).

88. *Id.* at 345 (citations and internal quotation marks omitted).

89. *See, e.g.*, Ciechon v. City of Chicago, 686 F.2d 511, 516–17 (7th Cir. 1982) (finding that a paramedic, who did not claim to be part of any class had a valid Equal Protection claim when she alone was blamed for the death of a patient even though her co-worker was equally responsible).

90. *See, e.g.*, *id.* at 522–24.

jured maliciously or in bad faith as a valid class.[91] In the landmark case *LeClair v. Saunders*,[92] an inspector closed down the plaintiffs' dairy farm after finding that it violated a clean water regulation.[93] The plaintiffs brought an individual Equal Protection claim of selective enforcement, because out of the ten or eleven farms with the same health violation, the plaintiffs' farm was the only one whose license was permanently suspended.[94] In considering whether the plaintiff had a valid claim, the Second Circuit added a malicious or bad faith motive to the list of other impermissible classifications.[95] The court explained that inspectors cannot use their discretion to act capriciously against individuals,[96] but held that the plaintiffs had not met the stringent standard of proof for malice because they had only alleged facts that could lead to a weak inference of the possibility of malice.[97]

The First Circuit applied a similar test in *Rubinovitz v. Rogato*,[98] when it held that a plaintiff could bring a claim based on a showing of bad faith or malicious intent to injure, although it left open the question of whether the plaintiff must show a series of malicious acts or a malicious group conspiracy rather than a single act.[99] In deciding to adopt the Second Circuit's bad faith motive test, the court noted that the standard of proof for showing malicious intent was extremely high and, therefore, cases claiming malicious action were not likely to survive summary judgment.[100] Here, the plaintiffs claimed that a city's safety, plumbing, and gas inspectors had conspired against the plaintiffs to deny them permits after the plaintiffs evicted a tenant.[101] According to the plaintiffs, the tenant's influential friend had maliciously turned the government officials against the plaintiffs.[102] Despite the high standard of proof for malicious intent, the court determined that there might be sufficient proof of malice based on the

91. *See* Rubinovitz v. Rogato, 60 F.3d 906, 910 (1st Cir. 1995) (finding that a husband and wife had a valid equal protection claim if they could show that city officials improperly singled them out for differential treatment); LeClair v. Saunders, 627 F.2d 606, 610 (2d Cir. 1980) (finding that an individual farmer could have a valid equal protection claim if he could show that an inspector maliciously denied his permit).

92. 627 F.3d 606 (2d Cir. 1980).

93. *Id.* at 607–08.

94. *Id.* at 608.

95. *Id.* at 609–10.

96. *Id.* at 608–09.

97. *Id.* at 610–11.

98. 60 F.3d 906 (1st Cir. 1995).

99. *Id.* at 912.

100. *See id.* at 911.

101. *Id.* at 908–09.

102. *Id.*

approval of permits to similarly situated residents and the defendants' outright hostility.[103]

In 1982, the Seventh Circuit first addressed explicit class-of-one claims in *Ciechon v. City of Chicago*,[104] a poignant case that provided the Seventh Circuit with a strong analytical foundation for future class-of-one claims. In *Ciechon*, the city government publicly suspended and then fired a paramedic for failing to administer oxygen to a patient who later died.[105] The city, however, simultaneously exonerated and praised the other paramedic who attended the call, despite the fact that both paramedics played an equal role in the decision-making process and were equally responsible for the care of the patient.[106] The court concluded that the plaintiff was fired as a scapegoat to counter the negative publicity, because there was no possible scenario in which the plaintiff could be condemned while the other paramedic could be absolved.[107] Thus, because the city could not establish any rational basis for the differential treatment to negate the showing of ill-will, the court upheld the plaintiff's Equal Protection claim.[108]

Over the next two decades, the Seventh Circuit applied several different standards for class-of-one claims, the most influential of which was Chief Judge Posner's vindictive action standard, first applied in *Esmail v. Macrane*.[109] In *Esmail*, the plaintiff claimed that the town mayor denied the plaintiff's application for a liquor license out of pure malice and animosity.[110] Although the mayor claimed that he denied the license because the plaintiff had committed various minor infractions, the plaintiff alleged that the city had a policy of granting, and had actually granted, licenses to all other liquor stores with similar charges.[111] The court articulated a class-of-one standard requiring an element of ill-will, stating that an individual had a valid class-of-one claim when state officials intentionally attempted to disadvantage an individual for reasons wholly unrelated to any legitimate state purpose.[112] The court reasoned that individuals should have some recourse against powerful government officials who resent them.[113]

103. *Id.* at 912.
104. 686 F.2d 511, 522–24 (7th Cir. 1982).
105. *Id.* at 515–16.
106. *Id.* at 524.
107. *Id.* at 515, 524.
108. *Id.* at 524.
109. 53 F.3d 176, 180 (7th Cir. 1995).
110. *Id.* at 177–78.
111. *Id.* at 178.
112. *Id.* at 180.
113. *Id.* at 179.

Finally, the court emphasized that this standard would not lead to an unmanageable number of claims in federal court because the required malice must be proved at a higher standard than in the similar tort of malicious prosecution.[114]

The Supreme Court first explicitly accepted the validity of class-of-one Equal Protection claims in the 2000 case of *Village of Willowbrook v. Olech*.[115] In *Olech*, the plaintiffs alleged intentional and irrational government discrimination when the local municipality demanded that the plaintiffs cede a thirty-three-foot land easement to the municipality for water pipes while requiring similar landowners to relinquish only a fifteen-foot easement.[116] The six-justice majority reasoned that the number of individuals in a "class" is irrelevant, and held that an individual has a valid Equal Protection claim if she shows that she was intentionally treated differently from similarly situated persons and that the differential treatment was irrational and completely arbitrary.[117] The majority found the plaintiff's alternative theory of ill-will unnecessary to state a valid claim,[118] but Justice Breyer asserted in a concurring opinion that a valid class-of-one claim should allege vindictive action or ill-will in order to prevent transforming almost every minor government action into a constitutional violation.[119]

Despite the *Olech* majority's seemingly straightforward rejection of the need to show ill-will, lower courts subsequently split on whether to continue to require an allegation of ill-will in class-of-one claims. For example, in *Eichenlaub v. Township of Indiana*,[120] a land development discrimination case, the Third Circuit narrowly interpreted the Supreme Court's holding in *Village of Willowbrook v. Olech* and found that a plaintiff did not have to show ill-will, only that he was "intentionally treated differently from others similarly situated and there was no rational basis for the differential treatment."[121] The court emphasized, however, that the plaintiff had a heavy burden of showing that the defendants had no rational justification for the allegedly differential treatment.[122] In contrast, in *Hilton v. City of Wheeling*,[123] Chief

114. *Id.* at 180.

115. 528 U.S. 562, 564–65 (2000) (per curiam).

116. *Id.* at 563.

117. *Id.* at 564–65.

118. *Id.*

119. *Id.* at 566 (Breyer, J., concurring).

120. 214 F. App'x 218 (3d Cir. 2007).

121. *Id.* at 224 (quoting Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam) (internal quotation marks omitted)).

122. *Id.* at 225.

123. 209 F.3d 1005 (7th Cir.), *cert. denied*, 531 U.S. 1080 (2001).

Judge Posner applied a vindictive action standard to a case where the plaintiff accused the police department of selectively responding to neighborhood calls.[124] Chief Judge Posner reasoned that in this context the police had broad discretion in how to enforce the law, and a standard requiring only an arbitrary, unexplained difference in treatment would open the court doors too wide.[125] Yet even in this discretionary context, Chief Judge Posner indicated that if the police had treated the plaintiff differently purely out of malice or a motive similarly illegitimate, such as bribery, the plaintiff would have a valid Equal Protection claim.[126]

After the *Olech* decision, some courts began to express concern with the implications of allowing class-of-one claims in the public employment context. For example, in *Campagna v. Commonwealth of Massachusetts Department of Environmental Protection*,[127] the lower court feared that practically any public employee would be able to assert a class-of-one claim.[128] However, the court solved this problem by creatively defining the extent to which a plaintiff had to be similarly situated to others who were treated differently.[129] The court found that this plaintiff was not similarly situated with other inspectors because he had performed his inspection as an independent contractor, rather than as part of his public employment.[130]

B. The Supreme Court Has Consistently Upheld Public Employees' Constitutional Rights While Balancing Them Against the Narrowly-Tailored Right of the Government to Promote Efficiency in the Workplace

Historically, courts almost completely deferred to the government's judgment in its management of employees.[131] For example, in *McAuliffe v. Mayor and Aldermen of New Bedford*,[132] the Massachusetts Supreme Court considered whether a public employer violated the First Amendment rights of a policeman who was fired because he had solicited political donations and been a member of a political commit-

124. *Id.* 1007–08.
125. *Id.* at 1008.
126. *Id.* at 1007.
127. 206 F. Supp. 2d 120 (D. Mass. 2002).
128. *Id.* at 126–27.
129. *Id.* at 127.
130. *Id.*
131. *See, e.g.*, McAuliffe v. Mayor and Bd. of Aldermen of New Bedford, 29 N.E. 517, 517 (Mass. 1892) (asserting that an employee "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman").
132. 29 N.E. 517.

tee.[133] The court reasoned that almost every employment situation requires the employee to give up his free speech rights, and the employee should not complain if he takes the job on the terms on which it was offered.[134] Therefore, the court found the restrictions on speech to be reasonable and within the government employer's rights.[135]

Modern courts attempt to strike a careful balance between the legitimate interests of the government and the constitutional rights of employees, while still recognizing that the government has broader powers as an employer than as a sovereign.[136] Until the late 1960s, the Court did not explicitly declare a balancing test standard, but nevertheless engaged in balancing analysis.[137] For example, in 1952, in *Wieman v. Updegraff*,[138] the Supreme Court examined whether a state could require public teachers to take a loyalty oath swearing that they had never been a member of a listed group of communist or subversive organizations.[139] The Court found that the loyalty oath was an arbitrary assertion of power because it could punish individuals who had innocently belonged to one of the listed organizations without knowing the political nature of the group.[140] The Court dismissed as irrelevant the government's argument that the plaintiff did not have any right to public employment, and found instead that the employee's interest in being protected from an arbitrary, irrational exclusion from employment was greater than the government's interest in national security[141] because the employer could confront the threat in ways that did not violate the employee's rights.[142]

Less than a decade later, the Supreme Court in *Cafeteria & Restaurant Workers Union v. McElroy*[143] held that a naval base cook accused of being a security risk could be excluded from her employment without being given a hearing or even told why she had been labeled a

133. *Id.* at 517.

134. *Id.* at 517–18.

135. *Id.* at 518.

136. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (applying a test balancing government employer and employee interests).

137. *See, e.g.*, Wieman v. Updegraff, 344 U.S. 183, 190–91 (1952) (balancing the interest of the government in ensuring the loyalty and trustworthiness of its employees and the interest of government employees in being free from unwarranted dismissal).

138. 344 U.S. 183.

139. *Id.* at 185.

140. *Id.* at 190–91.

141. *Id.* at 191.

142. *Id.* at 188.

143. 367 U.S. 886 (1961).

risk.[144] The Court reasoned that at-will public employees could be fired without notice or a hearing, even though they could not be fired for wholly arbitrary reasons.[145] In its analysis of the balancing factors, the Court noted that the government has traditionally held almost complete power on military bases,[146] and here, unlike *Wieman*, the employer provided the employee with some rational reason for the exclusion.[147]

In 1968, the Supreme Court first explicitly articulated the balancing test it had indirectly applied in previous public employment cases.[148] In *Pickering v. Board of Education*,[149] the plaintiff school teacher wrote a letter to the editor of a newspaper the criticized the way the school board had handled financial issues in the past and accused the school superintendent of trying to prevent teachers from publicly opposing a tax increase that would be used to support education.[150] The school board subsequently fired the teacher.[151] The Supreme Court applied a clear balancing test and weighed the interests of the employee against the state's interests, as an employer, in promoting the efficiency of its services.[152] The Supreme Court concluded that the school board's interest in preventing teachers from acting in ways detrimental to the best interests of the school did not outweigh the teacher's constitutional right to speak on issues of public concern.[153] After *Pickering*, courts continued to strike a fair balance between the constitutional rights of public employees and the interests of the government employer.[154]

Yet while courts now apply a balancing test, the test is not weighed entirely evenly, for courts continue to grant the government greater latitude in its role as employer than as sovereign. For example, in 1983, in *Connick v. Myers*,[155] the Supreme Court reaffirmed that

144. *Id.* at 898–99.
145. *Id.* at 898.
146. *Id.* at 896.
147. *Id.* at 898.
148. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).
149. 391 U.S. 563.
150. *Id.* at 566.
151. *Id.*
152. *Id.* at 568.
153. *Id.* at 573. The Court echoed an earlier case declaring that "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Id.* at 568 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 605–06 (1967)).
154. Indeed, by 1983, the Supreme Court noted that it was responsible for preventing workers from being deprived of their fundamental rights in the workplace. Connick v. Myers, 461 U.S. 138, 147 (1983).
155. 461 U.S. 138.

the government has a strong legitimate interest in promoting efficiency and in maintaining proper discipline in the public service.[156] The Court found that a district attorney did not violate the free speech rights of his subordinate lawyer when he terminated the lawyer for distributing a survey to her co-workers that appeared to criticize office policies and morale.[157] In finding for the employer, the Court determined that because government functionality would suffer "if every employment decision became a constitutional matter,"[158] the government could restrict the free speech of a public employee unless the speech touched on a subject of public concern and as long as the injury the speech caused was not too great.[159]

Likewise, the Court in *O'Connor v. Ortega*[160] found that a government employer did not need to obtain a search warrant before searching a public doctor's office.[161] The Court reasoned that the difficult process of obtaining a search warrant would interfere with hospital efficiency,[162] and that the hospital employees should have had a reasonable expectation that their offices and desks, which were often used for conferences and meetings, were public.[163] The Court, however, was clear that in excluding the need for search warrants in the public employment context, it was not denying public employees protection from unreasonable searches.[164] Rather, it merely held that in this specific context, such searches were reasonable.[165]

Finally, the Supreme Court reaffirmed that employees' interests in constitutional protection do not protect against mere mistakes.[166] In *Bishop v. Wood*,[167] a policeman classified as a permanent employee claimed that he had a right to a pretermination hearing before he could be dismissed.[168] The petitioner alleged that the department dismissed him on false charges, and stated that the dismissal violated his Due Process rights.[169] The Court held that employees may not

156. *Id.* at 146.
157. *Id.* at 154.
158. *Id.* at 143.
159. *Id.* at 146.
160. 480 U.S. 709 (1987).
161. *Id.* at 728.
162. *Id.* at 721.
163. *Id.* at 717.
164. *Id.* at 717–18.
165. *Id.* at 717.
166. *See* Bishop v. Wood, 426 U.S. 341, 349–50 (1976) (holding public employees are not protected from mistaken employment decisions).
167. 426 U.S. 341.
168. *Id.* at 342–43.
169. *Id.* at 343.

bring suit for incorrect or ill-advised personnel decisions in the absence of any claim that the employer was motivated by a desire to deny the employee his constitutionally protected rights.[170]

In addition to free speech and privacy claims, the Supreme Court has consistently applied the Equal Protection Clause in the public employment context.[171] In these cases, the Court applies both the tri-level standard from other Equal Protection cases and the balancing test fom public employment cases.[172] For example, in 1976, the Court in *Massachusetts Board of Retirement v. Murgia*[173] held that a mandatory retirement for police officers at age fifty was valid, despite the plaintiff's individual fitness to continue work, because the classification was rationally related to the government interest in maintaining a physically strong police force.[174] The Court hinted that the balance would weigh more heavily in favor of an employee if the employee was fired for illegitimate purposes.[175] Three years later, the Court further entrenched Equal Protection rights in the public employment context in *Personnel Administrator of Massachusetts v. Feeney*.[176] In that case, a non-veteran female employee claimed that a state policy giving veterans life-long preference above all non-veteran applicants to civil service jobs discriminated against women.[177] Even though the policy was gender-neutral, the plaintiff claimed that the legislature knew that the effect of the policy would be to make it very difficult for women to obtain a civil service job because very few women were veterans.[178] The Court held that a policy of preferring veterans in the civil service did not violate the Equal Protection Clause by discriminating against women.[179] The Court reasoned that, although the preference did, in

170. *Id.* at 350. Interestingly, the majority noted that the Court's holding would not have changed with regard to the plaintiff's Due Process claims even if the city manager had intentionally lied. *Id.* at 349 n.13.

171. *See, e.g.*, Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 200–01 (1979) (holding that a small group of public teachers was not denied equal protection when they were required to complete certain educational certification requirements earlier than other teachers due to their previous failure to comply with the same requirement).

172. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314–17 (1976) (per curiam) (analyzing mandatory retirement age for police officers under rational basis and balancing the employer interest against employee harm).

173. 427 U.S. 307.

174. *Id.* at 316–17.

175. *Id.* at 313. The Court noted that even though the employee could not assert a right to work for the government, "it is settled that . . . we have always carefully looked at the reasons asserted for depriving a government employee of his job." *Id.* at 323.

176. 442 U.S. 256 (1979).

177. *Id.* at 259.

178. *Id.* at 259–60.

179. *Id.* at 275.

fact, have a significant negative effect on women, the preference only intended to honor and support veterans rather than intending to harm women.[180] Therefore, because the legislation had a legitimate motive to which it was rationally related, it was valid.[181] Similarly, in *New York City Transit Authority v. Beazer*,[182] the Supreme Court held that a law categorically excluding all methadone users from public transit employment, regardless of their stage in a treatment program, was valid because it had a legitimate, rational purpose of promoting safety and efficiency, and it did not likely reflect an illegitimate government bias.[183]

C. One of the Main Underlying Purposes of the Equal Protection Clause Is to Protect Citizens From Ill-Will at the Hands of the Government

The original purpose of the Fourteenth Amendment was not to prevent all differential treatment, but rather to prevent irrational and improper differential treatment.[184] For this reason, the analysis of discriminatory motive has played a large role in Equal Protection litigation.[185] While the Supreme Court, however, has consistently invalidated governmental acts that reflect ill-will,[186] the lower courts are split on whether to require an explicit showing of ill-will in class-of-one claims.[187]

1. The Supreme Court Invalidates Government Legislation and Acts Reflecting a Motive of Ill-Will

In early Equal Protection cases, the Supreme Court referred to bad faith motive as an element of its analysis to invalidate classifications but did not directly address the extent to which it could be a determinative factor.[188] The Court's main analysis remained purely objective: whether and how well a government classification furthered the articulated government goal.[189] Thus, in 1971, in *Palmer v. Thomp-*

180. *Id.*
181. *Id.*
182. 440 U.S. 568 (1979).
183. *Id.* at 592–94.
184. *See infra* Part II.C.1.
185. *See infra* Part II.C.1.
186. *See infra* Part II.C.1.
187. *See infra* Part II.C.2.
188. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (articulating the distinction between improper and proper group classifications by defining improper classifications as those drawn "with an evil eye and an unequal hand" or motivated by a feeling of antipathy).
189. *See supra* Part II.A.1.

son,[190] the Supreme Court downplayed the role of ill-will motivation.[191] Holding that a city could shut down its public pools instead of obeying an order to desegregate them, the Court reasoned that the likely motive of ill-will did not invalidate the act when other legitimate reasons, such as economics and safety, had also played a role in the decision.[192] In so holding, the Court focused on the difficulty of an inquiry into legislative motives.[193]

Just two years later, the Supreme Court seemed to shift its stance on the role of ill-will in the first of a line of cases invalidating government legislation under a rational basis test.[194] In *Department of Agriculture v. Moreno*,[195] the Court held that a law that denied food stamps to unrelated people living together was invalid.[196] Under this law, indigent plaintiffs in difficult situations, including a single mother with three children who cared for a young woman with emotional problems, were denied food stamps.[197] Although the government asserted that the purpose of the law was to minimize fraud in food stamp programs, the Court found instead that the true purpose was to target hippie communities.[198] Similarly, in *City of Cleburne v. Cleburne Living Center, Inc.*,[199] the Court struck down a law disadvantaging disabled people despite the use of rational basis review.[200] As in *Moreno*, the Court emphasized the existence of government ill-will directed towards the plaintiffs.[201] The Court echoed the words of *Moreno* that a desire to harm is not a legitimate purpose, and will not be upheld.[202] The Court struck down government legislation using a rational basis test for the third time in *Romer v. Evans*.[203] In *Romer*, the state legislature had enacted a law prohibiting itself from passing any laws specifically protecting homosexuals.[204] As with the other two cases, the

190. 403 U.S. 217 (1971).

191. *See id.* at 224 (stating that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it").

192. *Id.* at 224–26.

193. *Id.* at 224.

194. *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 529, 538 (1973) (invalidating food stamp regulations under the rational basis test).

195. 413 U.S. 528.

196. *Id.* at 538.

197. *Id.* at 532.

198. *Id.* at 534.

199. 473 U.S. 432 (1985).

200. *Id.* at 449–50.

201. *Id.* at 450.

202. *Id.* at 447.

203. 517 U.S. 620, 631–32 (1996).

204. *Id.* at 624.

Court found that the classification was invalid because it reflected a desire to harm an unpopular group.[205]

In contrast, the Court refused to strike down under strict scrutiny government acts and legislation that had severe consequences for the plaintiffs when the Court could find no ill-will or malicious motive.[206] In *Washington v. Davis*,[207] black applicants to a police department alleged that the department discriminated against African-Americans by requiring a written test that a disproportionate number of the black applicants failed.[208] The Court held that a disproportionate effect alone did not prove racial discrimination, and the government had a compelling interest in ensuring that its police officers possessed strong communication skills.[209] However, the Court found that if there had been a claim of intentional, purposeful discrimination or discriminatory acts, the Court might have found such a case unconstitutional.[210] Similarly, in *McCleskey v. Kemp*,[211] the Court upheld the use of capital punishment, even though statistics showed that capital punishment was more likely to be used on blacks than on whites, because the plaintiffs could not show that the legislature had any discriminatory motive in applying the death penalty to minorities.[212]

With a newborn acceptance of the determinative role intent could play in invalidating an otherwise neutral law or action, the Court turned to clarifying how such a finding of intent would work within its current analytical framework. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[213] the Court composed a list of factors to help determine whether a government actor had a discriminatory motive.[214] The Court stated that after a showing of an apparently arbitrary action, courts may consider the following factors to determine discriminatory motivation: (1) whether there was a clear pattern unexplainable other than on the basis of some discriminatory motive; (2) the background of the decision; (3) the specific sequence of events; (4) departures from normal procedure; and (5) the legisla-

205. *Id.* at 632.

206. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 291–92 (1987) (upholding the use of capital punishment despite its disparate effect on blacks).

207. 426 U.S. 229 (1976).

208. *Id.* at 233.

209. *Id.* at 245–46.

210. *Id.* at 241.

211. 481 U.S. 279.

212. *Id.* at 291, 292–93.

213. 429 U.S. 252 (1977).

214. *Id.* at 266–68.

tive or administrative history, particularly statements by the decision makers.[215]

2. *The Lower Courts Split on Whether to Require an Explicit Showing of Ill-Will in Class-of-One Claims*

Although it is now well established that courts will look for a way to assess whether subjective ill-will played a role in the formation of a facially neutral law having a discriminatory effect, courts have split on whether to require an explicit showing of ill-will in class-of-one claims. Prior to the 2008 *Engquist* decision, all nine circuit courts that had considered class-of-one Equal Protection claims in the public employment context upheld the validity of such claims, but disagreed on the standard to apply.[216] The differences in the standards turned on how similarly situated a plaintiff had to be to another employee and the degree to which a plaintiff had to show a malicious motivation or ill-will on the side of the government. With regard to ill-will, some circuits applied a broad approach like that in *Olech*, leaving out the employer's subjective motive.[217] Other circuits adopted a more stringent test requiring the plaintiff to demonstrate that the government ac-

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215. *Id.*

216. *See* Eichenlaub v. Twp. of Ind., 214 F. App'x 218, 224–25 (3d Cir. 2007) (downplaying the importance of proving someone else was similarly situated), *cert. denied*, 128 S. Ct. 201 (2007); Scarbrough v. Morgan County Bd. of Educ., 470 F.3d 250, 260–61 (6th Cir. 2006) (finding that a successful class-of-one plaintiff may show lack of rational basis by negating every conceivable basis *or* showing that disparate treatment was based on ill-will); Whiting v. Univ. of S. Miss., 451 F.3d 339, 348–50 (5th Cir. 2006) (finding that ca lass-of-one plaintiff must establish she was "intentionally treated differently from others similarly situated" and there was "no rational basis" for the disparate treatment (citation and internal quotation marks omitted)), *cert. denied*, 549 U.S. 1112 (2007); Howard v. Columbia Pub. Sch. Dist., 363 F.3d 797, 804 (8th Cir. 2004) (emphasizing discriminatory motive), *cert. denied*, 543 U.S. 956 (2004); Kirby v. City of Elizabeth City, 388 F.3d 440, 447 (4th Cir. 2004) (finding that a successful class-of-one plaintiff must negate any rational reason for the disparate treatment rather than simply proving the defendant's actual motive was irrational), *cert. denied*, 547 U.S. 1187 (2006); Campagna v. Mass. Dep't of Envtl. Prot., 334 F.3d 150, 156 (1st Cir. 2003) (holding plaintiffs to a stringent definition of "similarly situated" for the purpose of class-of-one claims); Cobb v. Pozzi, 363 F.3d 89, 110 (2d Cir. 2003) (finding that in order to state a valid Equal Protection class-of-one claim, plaintiffs must show they were treated differently from similarly situated officers and there was no rational reason for the disparate treatment); Bartell v. Aurora Pub. Sch., 263 F.3d 1143, 1148–49 (10th Cir. 2001) (finding that a successful class-of-one plaintiff must show he was "singled out for persecution due to some animosity" on the part of the government); Hilton v. City of Wheeling, 209 F.3d 1005, 1008 (7th Cir. 2000) (requiring class-of-one plaintiffs to show "totally illegitimate animus" of government actor (citation and internal quotation marks omitted)), *cert. denied*, 531 U.S. 1008 (2001).

217. *See, e.g.*, *Campagna*, 334 F.3d at 156 (holding that the plaintiff inspector must only show that the government act was wholly irrational).

tions were motivated by some type of ill-will.[218] The most stringent tests required that ill-will be the only reason for the government action.[219]

III. THE COURT'S REASONING

In *Engquist v. Oregon Department of Agriculture*,[220] the Supreme Court held that a class-of-one claim alleging discrimination for vindictive, irrational purposes is not a valid legal claim in the context of public employment.[221] Writing for the majority, Chief Justice Roberts[222] agreed with *Engquist* that the Equal Protection Clause "protect[s] persons, not groups," and that the Clause protects persons from discriminatory individuals acting on behalf of the government, as well as from discriminatory legislative actions.[223] The Court, however, rejected the claim that protection from irrational or arbitrary government employment decisions is a constitutional right.[224] In its analysis of the class-of-one theory, the Court emphasized two main principles: first, that courts must balance individual constitutional rights against the "realities of the employment context," and second, that courts must differentiate between basic and secondary rights.[225]

With these considerations in mind, the Court reasoned that a class-of-one claim would clash with the realities of the public employment context because such a claim would force courts to make impossible comparisons of discretionary treatment of employees, undermine the efficiency of the government as employer, and impermissibly constitutionalize the employee grievance.[226] Finally, the Court concluded that even if some class-of-one claims were worthy of

218. *See, e.g.*, *Scarborough*, 470 F.3d at 261 (invalidating a government employment decision under a test acknowledging that a class-of-one claim must allege that the act was unrelated to a legitimate purpose, but that an illegitimate animus is never a legitimate purpose).

219. *See Kirby*, 388 F.3d at 447 (finding that the plaintiff must negate any "reasonably conceivable state of facts that could provide a rational basis" for the government's irrational treatment (citation and internal quotation marks omitted)).

220. Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146 (2008).

221. *Id.* at 2157.

222. *Id.* at 2148. Justices Scalia, Kennedy, Thomas, Breyer, and Alito joined Chief Justice Roberts in the majority opinion. *Id.*

223. *Id.* at 2150 (alteration in original) (citation and internal quotation marks omitted).

224. *Id.* at 2151.

225. *Id.* at 2152. The Court defined a basic right as one that "implicates the basic concerns of the relevant constitutional provision," and a secondary right as one that "can more readily give way" to the government's needs. *Id.*

226. *Id.* at 2156.

constitutional protection, the governmental and legislative burden to litigate all such claims would simply be too great.[227]

Justice Stevens, joined by Justices Souter and Ginsburg, dissented, criticizing the majority for depriving state employees of their constitutional right to freedom from "unequal and irrational treatment" by the government.[228] Justice Stevens broadly interpreted *Olech*'s holding as protecting individuals from any intentionally irrational government discrimination, regardless of the context, unless the actions have a rational basis.[229] He rejected the majority's arguments against judicial oversight of discretionary decisions, arguing instead that there are clear, judicially determinable distinctions between permissible, discretionary employment decisions and impermissible, irrational employment decisions.[230] Justice Stevens further argued that years of precedent support the regulation of at-will employment.[231] Finally, he accused the majority of resorting to legal fiction in order to avoid the possibility of increased litigation.[232]

IV. ANALYSIS

In *Engquist v. Oregon Department of Agriculture*, a six-Justice majority of the Supreme Court categorically rejected the validity of any class-of-one claim in the public employment context.[233] Utilizing the *Olech* test, which only required the plaintiff to show wholly arbitrary treatment, the majority reasoned that class-of-one claims in public employment would lead to improper and excessive judicial interference with the role of the government as employer.[234] Rather than categorically rejecting the validity of class-of-one claims in the public employment context, the Supreme Court should have instead adopted a stringent rational basis test, requiring plaintiffs to show they were: (1) intentionally treated differently from others similarly situated; (2) for exploitative or malicious reasons; and (3) for no rational reason.[235]

227. *Id.* at 2157. Chief Justice Roberts compared a case that would meet Engquist's proposed analysis to a "proverbial needle in a haystack." *Id.*

228. *Id.* at 2157–58 (Stevens, J., dissenting).

229. *Id.* at 2158.

230. *Id.* at 2159.

231. *Id.* at 2160.

232. *Id.* at 2161. Specifically, Justice Stevens countered the majority's argument that courts should not have to search for the "proverbial needle in a haystack" of litigation to find a valid case by noting that class-of-one claims in public employment are rare. *Id.* He then declared that "a federal court should not misconstrue the Constitution in order to make it even easier to dismiss unmeritorious claims." *Id.*

233. *Id.* at 2148–49.

234. *Id.* at 2153, 2156.

235. *See infra* Part IV.C.

This Part shows that class-of-one claims in the public employment context are supported by precedent and are viable. First, precedent shows that the Supreme Court has recognized a widening scope of the Equal Protection Clause, and class-of-one claims in the public employment context fit with the Court's emphasis on individual rights.[236] Second, the Supreme Court has never completely excluded a constitutional right from the public employment context, and class-of-one claims fit with the Court's standard that public employees may not be subjected to unreasonable employment conditions.[237] Finally, a requirement of ill-will is the key to a workable class-of-one claim in public employment because it would reduce the number of claims to a manageable level and diminish the risk of courts encroaching on discretionary employment decisions.[238]

A. By Rejecting Class-of-One Claims in the Public Employment Context, the Supreme Court Ignored Its Trend of Recognizing the Widening Scope of the Equal Protection Clause

Although the Fourteenth Amendment was drafted in response to the backlash of discrimination against African-Americans following the Civil War,[239] the Supreme Court has consistently acknowledged that the Equal Protection clause is intended to protect *every* person

236. *See infra* Part IV.A.

237. *See infra* Part IV.B.

238. *See infra* Part IV.C. This test may not solve all of the problems of applying class-of-one claims in the public employment context, but it attempts to seek a more even balance between employer and employee rights. As scholars have noted, defining workable standards for treating individuals equally presents many difficulties. *See* LOUIS MICHAEL SEIDMAN, CONSTITUTIONAL LAW: EQUAL PROTECTION OF THE LAWS 289 (2003) (describing Equal Protection analysis as a struggle "between universalism and particularism, between the public and the private, between likeness and difference—the stuff of equal protection controversy—are ongoing and unending"). If the test proposed in this Note is still too broad, the test might be made even more stringent by requiring a "shocks the conscience" standard that would recognize only the most egregious of cases. *See* William D. Araiza, *Irrationality and Animus in Class-Of-One Equal Protection Cases*, 34 ECOLOGY L.Q. 493, 514–15 (2007) (explaining how class-of-one claims might fit with a "shocks the conscience" standard).

239. *See Ex parte* Virginia, 100 U.S. 339, 344–45 (1880) ("One great purpose of [the Fourteenth Amendment] was to raise [African-Americans] from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States."); *see also* Timothy Zick, *Angry White Males: The Equal Protection Clause and "Classes of One,"* 89 KY. L.J. 69, 89–93 (2000) (discussing the history of the proposition and drafting of the Fourteenth Amendment and the Equal Protection Clause). The historical tie of the Equal Protection Clause to the protection of racial minorities, and the famous use of the Equal Protection Clause in the Civil Rights Movement in cases such as *Brown v. Board of Education* have led some scholars to accept the anti-discrimination principle—stigma theory, which argues that courts should only be concerned with group classifications because group membership is the proxy for determining whether discrimination targeted a minority. *Id.* at 94–95.

from intentional and arbitrary discrimination.[240] Throughout the history of Equal Protection jurisprudence, courts have attempted to provide greater Equal Protection rights, even to the extent of blurring the rigid hierarchy of the traditional tri-level analysis.[241] Yet in *Engquist*, the Court justified excluding individual class-of-one claims from public employment by focusing on the traditional emphasis on group classifications.[242] Although the Court acknowledged that "[i]t is well settled that the Equal Protection Clause 'protect[s] persons, not groups,' "[243] it declared that the central concern of the Equal Protection Clause was to protect against arbitrary classifications.[244] In emphasizing the importance of group classifications, the Court disregarded its modern trend of supporting individual Equal Protection rights[245] and extending Equal Protection to every context.[246]

The Court's strong rejection of the theory of individual rights in Equal Protection is a retreat from its stance in prior cases.[247] Most importantly, it appears to directly contradict *Village of Willowbrook v. Olech*,[248] where only eight years earlier, the Court declared that "the number of individuals in a class is immaterial for equal protection analysis."[249] *Olech's* easy acceptance of a class-of-one claim in a short,

240. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam). *But see* Zick, *supra* note 239, at 104 (arguing that a class-of-one is "no class at all" because the Equal Protection clause only protects individuals in their identity as group members).

241. *See* United States v. Virginia, 518 U.S. 515, 531 (1996) (declaring that parties seeking to defend gender-based classifications must prove at least a very persuasive justification).

242. Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2150–51 (2008).

243. *Id.* at 2150 (alterations in original) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 277 (1995)).

244. *Id.* at 2151. *But see* Esmail v. Macrane, 53 F.3d 176, 180 (7th Cir. 1995) (asserting that classifications should be "scrutinized more carefully" when a smaller and more vulnerable a class is involved).

245. *See* Shelley v. Kraemer, 334 U.S. 1, 22 (1948) (finding that Equal Protection rights are "guaranteed to the individual" and are "personal rights").

246. *See* Cooper v. Aaron, 358 U.S. 1, 17 (1958) (declaring that the Equal Protection Clause extends to all state actions, "whatever the agency of the State taking the action, or whatever the guise in which it is taken" (citation omitted)).

247. Although Equal Protection has most often involved group classifications, the Supreme Court has long emphasized individual rights, particularly in cases dealing with unequal application or selective enforcement of neutral laws. *See* Twp. of Hillsborough v. Cromwell, 326 U.S. 620, 623 (1946) (holding that the Equal Protection Clause "protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class"); Snowden v. Hughes, 321 U.S. 1, 8 (1944) (finding that a politician not claiming to be part of a particular class could have a valid Equal Protection claim); Missouri v. Lewis, 101 U.S. 22, 30 (1880) (emphasizing Equal Protection rights for individuals as well as groups).

248. 528 U.S. 562 (2000) (per curiam).

249. *Id.* at 564 n.1.

three-page opinion suggests that the Court felt class-of-one claims were already deeply entrenched in Equal Protection analysis.[250] In view of the long history of individual rights, which the Court unquestioningly accepted only eight years ago, the Court's sudden shunning of individual rights in *Engquist* is curious.

The *Engquist* Court attempted to justify its retreat from supporting individual Equal Protection rights by asserting that *Olech* was not a departure from the Court's prior emphasis on group classifications, but rather an "application of that principle."[251] The Court focused on the fact that *Olech* occurred in a relatively objective context, as did *Allegheny Pittsburgh Coal Co.* and *Sioux City Bridge* Co., the cases on which the *Olech* Court relied.[252] Each of those cases regarded the differential enforcement of a law or government policy.[253] The Court stated that in those types of situations, individuals may assert Equal Protection rights without being part of a class because one would expect those laws and policies to apply "without respect to persons."[254]

The Court's emphasis on subjective versus objective contexts to determine when to emphasize individual Equal Protection rights does not entirely fit with precedent because the Court has emphasized individual rights in many subjective contexts. For example, in *Yick Wo v. Hopkins*,[255] the Court struck down the method by which a board of supervisors granted business licenses, despite the fact that the board had complete discretion.[256] There, the Supreme Court rejected the lower court's argument that the applicants could not assert Equal Protection rights due to the discretionary nature of the decisions, declaring that the officials did not use their discretion in the way that it was legally given to them; rather, their use of discretion was "purely arbitrary, and acknowledges neither guidance nor restraint."[257] Thus, the

250. *Id.* at 564. Indeed, the Court seemed to imply that it had already accepted class-of-one claims in the past without acknowledging what they were. *Id.* Citing *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989) and *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923), the *Olech* Court stated that "[o]ur cases have recognized successful equal protection claims brought by a 'class of one.'" *Id.*

251. Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2153 (2008).

252. *Id.* at 2153–54.

253. *Allegheny Pittsburgh Coal Co.* and *Sioux City Bridge Co.* dealt with different applications of tax laws. *Allegheny Pittsburgh Coal Co.*, 488 U.S. at 345; *Sioux City Bridge Co.*, 260 U.S. at 445. *Olech* concerned the differential application of a policy regarding how much land residents needed to cede to the government in order to be connected to the city water line. *Olech*, 528 U.S. at 563.

254. *Engquist*, 128 S. Ct. at 2153 (citation and internal quotation marks omitted).

255. 118 U.S. 356 (1886).

256. *Id.* at 366–67.

257. *Id.* at 367.

Constitution places restrictions on arbitrary decisions even when government officials have total discretion.

In removing individual equal protection rights from public employment, the Court hoped to prevent an overwhelming amount of Equal Protection litigation.[258] Although this was a valid consideration, the Court should not have glossed over its prior emphasis on the importance of individual Equal Protection rights. The Court's argument that individual rights only applied in completely objective contexts was weak, considering the fact that the Court has historically emphasized individual equal protection rights in subjective, discretionary contexts.[259] Thus, the Court should have adopted a test respecting both individual rights and the integrity of the federal court system.[260]

B. The Equal Protection Clause Applies to the Public Employment Context Without Unduly Encroaching on the Government Employer's Discretion; Class-of-One Equal Protection Claims Can Do the Same

The *Engquist* majority focused its strongest arguments on the differences between the public employment context and other contexts in order to justify setting aside class-of-one claims only in the public employment context.[261] In doing so, the majority noted two major concerns: (1) that it is difficult to apply class-of-one claims in subjective contexts;[262] and (2) that the government has greater constitutional freedom as an employer than as sovereign, and may limit employees' constitutional rights in the interest of an efficient workplace.[263] Although these are both valid concerns, they should not have been determinative. First, precedent does not support excluding an entire class of Equal Protection claims from generally subjective contexts because the Court has declared that the Equal Protection Clause extends to all state actions regardless of the context.[264] Rather than excluding other Equal Protection claims from subjective contexts, the Court focuses on the extent to which individuals in subjec-

258. *Engquist*, 128 S. Ct. at 2157.

259. *See, e.g.*, *Yick Wo*, 118 U.S. at 366.

260. *See infra* Part IV.C.

261. *Engquist*, 128 S. Ct. at 2155. The majority explicitly limited its holding in *Engquist* to the public employment context. *Id.* at 2156.

262. *Id.* at 2154.

263. *Id.*

264. *See* Cooper v. Aaron, 358 U.S. 1, 17 (1958) (holding that the Equal Protection Clause governs state actors "whatever the agency of the State taking the action, or whatever the guise in which it is taken" (citations omitted)); *see also infra* Part IV.B.1.

tive contexts are similarly situated.[265] Second, although the government may dilute public employees' constitutional rights, courts have never completely excluded any type of constitutional claim from the public employment context.[266] Instead, courts carefully balance government interests against employees' interests and dilute employees' rights only to the extent necessary.[267]

1. The Majority Overemphasized the Subjective Nature of Public Employment

One of the majority's strongest objections to class-of-one claims in the public employment was the subjective nature of the employment context.[268] The Court emphasized that the significant characteristic in *Olech* was the "existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed,"[269] and noted that in comparison, public employers consider a multitude of factors when making employment decisions.[270] Thus, the Court found class-of-one claims unworkable in public employment because it would be impossible to treat every employee similarly.[271] In reaching this conclusion, the Court failed to consider two critical factors. First, the Court oversimplified its categorization of objective and subjective contexts.[272] Second, the Court failed to distinguish between those situations where employees are merely treated differently from

265. *See* Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 200 (1979) (finding that differential treatment of a group of public teachers who had failed to complete certification requirements was valid because the group was not similarly situated with those teachers who had completed the requirement). As commentators have stated, "the problem of equality is too vexing, and the solution too contradictory, to be captured by any formal test." SEIDMAN, *supra* note 238, at 246. In his discussion of the widening scope of the Equal Protection Clause, Professor Seidman notes that the problems with naming only a select group of classes as vulnerable creates "questions about whether the effort to locate and define particular groups vulnerable to unequal treatment makes sense. An alternative might focus on *what* is denied, rather than *who* is victimized by the denial." SEIDMAN, *supra* note 238, at 247.

266. *See* O'Connor v. Ortega, 480 U.S. 709, 725–26 (1987) (holding that government employers may search employees' desks without a search warrant but emphasizing that the holding does not subject government employees to unreasonable search and seizure in public employment); Connick v. Myers, 461 U.S. 138, 147 (1983) (holding that government employers may generally restrict employee free speech unless it touches on a matter of public concern).

267. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (articulating the balancing test to weigh individuals' constitutional rights against the interests of the government in public employment, wherein the government interests outweigh individual rights).

268. Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2154 (2008).

269. *Id.* at 2153.

270. *Id.* at 2154.

271. *Id.* at 2155.

272. *See id.* at 2154.

their co-workers, and those situations where employees are treated maliciously.[273] Although the government should retain its discretion when employment decisions depend on subjective considerations, the Court should have adopted a more flexible test that would allow public employees to assert class-of-one claims in situations where the government should have treated two employees alike, and its failure to do so was motivated by ill-will.[274]

The *Engquist* majority oversimplified its categorization of objective and subjective contexts when it held that class-of-one claims may be completely excluded from public employment due to the subjective nature of the context.[275] After noting the more objective contexts of *Olech* and the cases on which it was based, the Court distinguished the context of public employment, asserting that there is no clear standard for how government officials should treat every employee.[276] Rather, the Court noted that employment decisions are highly discretionary.[277] Although the employment context is more subjective than many of the previous cases in which the Supreme Court emphasized individual Equal Protection rights, the Court erred in its oversimplified classification of objective and subjective contexts to determine when individuals may assert Equal Protection rights.[278]

It is true that the government employer must be able to treat employees differently in most respects.[279] For example, it would be impossible to give promotions to all employees holding the same position, or to fire all similarly situated employees when it became

273. *See id.* The Court threw a blanket analysis on all class-of-one claims in the public employment context when it stated that "[i]n such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise." *Id.*

274. *See infra* Part IV.C.

275. *See Engquist,* 128 S. Ct. at 2154. The Court may have done this intentionally, for it stated that "employment decisions are *quite often* subjective and individualized." *Id.* (emphasis added). Thus, the Court hinted that sometimes employment decisions may be objective, but it utterly failed to address this distinction in its analysis. *See id.*

276. *Id.* at 2153–54.

277. *Id.* at 2154.

278. Professor William Araiza explained that class-of-one claims in every context must require a "complex combination of factors embedded in a unique factual context" and noted that prior to *Olech*, one court summarily rejected class-of-one claims in the land use context on the basis that every piece of land is unique. Araiza, *supra* note 238, at 507.

279. As the Court noted, there are many factors that go into employment decisions that are "difficult to articulate and quantify." *Engquist*, 128 S. Ct. at 2154. When making employment decisions, an employer must be able to consider the "individual personalities and interpersonal relationships of employees in the workplace[, t]he close relationship between the employer and employee, and the varied needs and interests involved." *Id.*

necessary to downsize.[280] Employment decisions often turn on intangible qualities such as personality, trustworthiness, and work ethic.[281] Certainly, government employers could not function efficiently if they could not use their subjective judgment without risking a lawsuit for arbitrary action.[282] The *Engquist* Court, however, failed to realize that most types of cases are not wholly objective or subjective.[283] Even land use cases, which the Court considered to be completely objective, require officials to compare unique pieces of land and determine if they are similar enough to justify a requirement of equal treatment.[284] Just as land use cases are not wholly objective, employment cases are not wholly subjective.[285]

There are some situations in which public employees are so similarly positioned that they should expect the employer's policies and actions to apply to them equally.[286] The fact that every court prior to *Engquist* accepted class-of-one claims in public employment strongly suggests that these claims can be workable, given the correct context and analysis.[287] Thus, instead of defining the entire employment con-

280. *See, e.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 317 (1976) (finding that the police department did not have to take each individual police officer's physical characteristics into account when upholding a mandatory retirement age).

281. *Engquist*, 128 S. Ct. at 2154.

282. The Engquist majority analyzed whether class-of-one claims are viable in the public employment context using the *Olech* "wholly arbitrary" standard. *Id.* at 2156.

283. *See id.*

284. Araiza, *supra* note 238, at 507.

285. *See* Ciechon v. City of Chicago, 686 F.2d 511, 516–17 (1982) (finding that an employment policy should have applied to both affected employees).

286. *Id.*; s*ee also* Robert C. Farrell, *Classes, Persons, Equal Protection, and* Village of Willowbrook v. Olech, 78 WASH. L. REV. 367, 376 (2003) (describing the lower courts' emphasis on whether class-of-one plaintiffs were sufficiently similarly situated as a "screening device" to prevent every act of bad faith from becoming a constitutional violation).

287. *See* Eichenlaub v. Twp. of Ind., 214 F. App'x 218, 224 (3d Cir. 2007) (allowing plaintiff to bring class-of-one claim in public employment using *Olech* standard), *cert. denied*, 128 S. Ct. 201 (2007); Scarbrough v. Morgan County Bd. of Educ., 470 F.3d 250, 260–61 (6th Cir. 2006) (finding that a successful class-of-one plaintiff may show lack of rational basis by negating every conceivable basis *or* by showing that disparate treatment was based on ill-will); Whiting v. Univ. of S. Miss., 451 F.3d 339, 348 (5th Cir. 2006) (finding that a class-of-one plaintiff must establish she was "intentionally treated differently from others similarly situated" and there was "no rational basis" for the disparate treatment (citation and internal quotation marks omitted)), *cert. denied*, 549 U.S. 1112 (2007); Howard v. Columbia Pub. Sch. Dist., 363 F.3d 797, 804 (8th Cir. 2004) (emphasizing discriminatory motive), *cert. denied*, 543 U.S. 956 (2004); Kirby v. City of Elizabeth City, 388 F.3d 440, 447 (4th Cir. 2004) (finding that a plaintiff must do more than prove that the defendant's actual motive was irrational and instead negate any rational reason for the disparate treatment), *cert. denied*, 547 U.S. 1187 (2006); Campagna v. Mass. Dep't of Envtl. Prot., 334 F.3d 150, 156 (1st Cir. 2003) (holding plaintiffs to a stringent definition of "similarly situated" for the purpose of class-of-one claims); Cobb v. Pozzi, 363 F.3d 89, 110 (2d Cir. 2003) (finding that in order to state a valid equal protection class-of-one claim, plaintiffs must

text as subjective, the Court should have focused on the extent to which the employees were similarly situated.[288] *Ciechon v. City of Chicago*[289] is one example of a situation in public employment where employees were so similarly situated that they should have expected government policy to apply to them equally.[290] In that case, two paramedics were equally responsible for the care and choice of treatment for a patient who later died, yet the employer fired one employee for the incident while praising the other.[291] Because the employees had committed the same act and had been equally responsible for the care of the patient, they were so similarly situated that they should have expected the employer to apply an equal policy.[292] Therefore, instead of categorizing the entire public employment context as "subjective," the *Engquist* Court should have considered as part of its test whether the situation required a subjective decision or an objective application of policy. When employees' situations are almost identical, courts should be willing to acknowledge their individual Equal Protection rights.[293] This test would be a more accurate application of the Court's precedent than rejecting individual class-of-one claims entirely in public employment.

Second, in entirely excluding class-of-one claims from public employment, the Court failed to distinguish between cases where employees are simply treated differently, and those where employees are treated differently for malicious reasons.[294] The Court has noted that, despite the more discretionary context of public employment, employees' constitutional rights cannot be subjected to differential treatment based on ill-will.[295] In almost every previous public employment

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show they were treated differently from similarly situated officers and there was no rational reason for the disparate treatment); Bartell v. Aurora Pub. Sch., 263 F.3d 1143, 1148–49 (10th Cir. 2001) (finding that a successful class-of-one plaintiff must show he was "singled out for persecution due to some animosity" on the part of the government); Hilton v. City of Wheeling, 209 F.3d 1005, 1008 (7th Cir. 2000) (requiring class-of-one plaintiffs to show the totally illegitimate animus of government actor), *cert. denied*, 531 U.S. 1008 (2001).

288. Even the *Engquist* majority accepted the claim that "[w]hen those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference." *Engquist*, 128 S. Ct. at 2153.

289. 686 F.2d 511 (7th Cir. 1982).

290. *See id.* at 516.

291. *Id.* at 522.

292. *See id.* at 523.

293. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564–65 (2000) (per curiam) (finding a valid Equal Protection claim when plaintiff's land situation was nearly identical to her neighbors).

294. Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2154 (2008).

295. *See* Bishop v. Wood, 426 U.S. 341, 350 (1976) (finding that even though public employees are not protected from ill-advised or mistaken employment decisions, they should be protected from decisions based on ill-will); Cafeteria & Rest. Workers Union v.

Equal Protection case, the Court noted whether a motive of malicious intent existed. For example, in *Personnel Administrator of Massachusetts v. Feeney*,[296] where the Court upheld a statute preferring (mostly male) veteran applicants for civil service jobs, the Court emphasized that there was no malicious intent to harm women.[297] Similarly, in New York City Transit Authority[298] v. *Beazer*, the Court explained that a city transit system could exclude individuals in drug treatment from public employment because the classification did not likely reflect any illegitimate purpose.[299] Thus, precedent shows that proof of an illegitimate purpose or ill-will diminishes the amount of deference courts will show to government employers' decisions.[300]

2. The Majority Improperly Applied the Balancing Test for Constitutional Rights in Public Employment When It Categorically Rejected Class-of-One Claims Because the Court Overemphasized the Importance of Government Discretion and Maintaining Pure At-Will Employment

Although the *Engquist* majority applied a balancing test,[301] it improperly balanced the government's interests with the constitutional rights of the employee when it overemphasized the importance of preventing litigation and maintaining pure at-will employment[302] and failed to consider protection from vindictive government action to be

McElroy, 367 U.S. 886, 898 (1961) (holding that a cook could be excluded from her military base employment because the government provided her with a rational reason for the exclusion); Wieman v. Updegraff, 344 U.S. 183, 192 (1952) (finding that a government employer cannot assert arbitrary power over employees' constitutional rights).

296. 442 U.S. 256 (1979).

297. *Id.* at 277.

298. 440 U.S. 568 (1979).

299. *Id.* at 592–93.

300. The Court already applies its rational basis standard flexibly. In some rational basis cases, the Court has required plaintiffs to negate every possible hypothetical rational basis. FCC v. Beach Comm., Inc., 508 U.S. 307, 313 (1993). Yet in other rational basis cases, particularly with a showing of ill-will, the Court has been unwilling to hypothesize rational reasons for the unequal treatment. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (finding unconstitutional a special permit requirement for a group home for the mentally retarded and refusing to hypothesize or accept rational reasons why the differential treatment might have been legitimate once the Court concluded that the discrimination was motivated by ill-will).

301. The Court noted that the rights of employees "must be balanced against the realities of the employment context" and that to engage in a proper balance, the Court considers "whether the asserted employee right implicates the basic concerns of the relevant constitutional provision." *Engquist*, 128 S. Ct. at 2152.

302. *See id.* at 2156 (stating that although "[s]tate employers cannot, of course, take personnel actions that would independently violate the Constitution[, the] recognition of a class-of-one theory of equal protection in the public employment context . . . is simply contrary to the concept of at-will employment") (citation omitted)).

a "basic concern" of the Equal Protection Clause.[303] Although the Court's fears regarding excess litigation and the undermining of at-will employment are legitimate, particularly in light of more trivial class-of-one cases being brought in the lower courts, those fears were not sufficient reasons to reject public employment class-of-one claims altogether.[304] A more equal balancing of government and employee interests would have supported a stringent test requiring a claim of ill-will or vindictive motivation on the part of the government. Such a test would have been more consistent with the Court's prior expansion of Equal Protection freedoms,[305] while still preventing an overwhelming deluge of cases and ensuring that cases would not be so trivial as to be a waste of federal resources.[306]

Although the majority correctly considered how a class-of-one claim in the public employment context would affect employers' discretion and the policy of at-will employment, the Court improperly placed the importance of maintaining a pure at-will public employment structure over the importance of an employee's right to bring a constitutional claim.[307] Despite the greater leeway that the government has in its role as employer, the Supreme Court has consistently held that courts must carefully weigh a government employer's interests against the interests of a public employee.[308] The Supreme Court has never entirely excluded any recognized class of constitutional protections from the public employment context, but instead dilutes employees' rights only to the extent necessary to protect government employers' legitimate interests.[309] Even where courts have significantly diluted employees' rights, the courts have cautiously noted that this dilution does not subject the employees to unreasonable working conditions.[310]

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303. *See id.* at 2151 (finding that "[o]ur traditional view of the core concern of the Equal Protection Clause as a shield against arbitrary classifications" leads to the conclusion that class-of-one claims are invalid in the public employment context).

304. *See* Araiza, *supra* note 238, at 501–02 (arguing that concern about creating floods of litigation is not a valid reason for completely excising some categories of unequal treatment from the protection of the Equal Protection Clause).

305. *See supra* Part II.A.

306. The federal courts' time and resources are very valuable. In order for a case not arising under federal law to be heard in federal court, Congress has required the case to have diverse parties and a claim exceeding $75,000. 28 U.S.C. § 1332(a) (2000).

307. *See Engquist*, 128 S. Ct. at 2156.

308. Pickering v. Bd. of Educ., 391 U.S. 563, 572–73 (1968).

309. *Id.* at 574.

310. *See* O'Connor v. Ortega, 480 U.S. 709, 725–26 (1987) (finding that public employers may search employees' offices without a warrant, but noting that employers still may not engage in unreasonable searches); McAuliffe v. Mayor and Bd. of Aldermen of New

Application of the Equal Protection Clause to the public employment context does not, in itself, completely invalidate public at-will employment, as the majority claims.[311] Indeed, the concept of at-will employment has already been significantly eroded.[312] Public employees are protected from discriminatory treatment through a variety of statutes, including the Civil Service Reform Act of 1978 ("CSRA").[313] The CSRA prohibits the federal government from discriminating against employees on the basis of race, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation.[314] More germane to the discussion of class-of-one claims, the Act also prohibits a federal employer from discriminating based on acts unrelated to employee performance.[315] Therefore, because the concept of at-will employment is already so tenuous in the public employment context, the Supreme Court improperly stressed the importance of this government interest when balancing the interests of public employees.[316] Instead of engaging in a true balancing of the government's need for efficiency, the Court seemed to weigh only one particular means—pure at-will employment—that the government used to achieve that efficiency.[317]

One of the balancing factors on the side of an employee is whether the employee's asserted right "implicates the basic concerns of the relevant constitutional provision."[318] The *Engquist* majority acknowledged the great importance of this factor, but held that class-of-one claims in public employment simply do not involve a basic constitutional concern.[319] The right to freedom from malicious or vindictive government action, however, has long been a core constitutional

Bedford, 29 N.E. 517, 517–18 (Mass. 1892) (holding that public employees' right to participate in the politics may be limited, but noting that such a limitation is not unreasonable).

311. *Engquist*, 128 S. Ct. at 2156.

312. For an explanation of the erosion of at-will employment in the public employment context, see generally Maheshwar Nath Chaturvedi, *Legal Protection Available to Federal Employees Against Wrongful Dismissal*, 63 NW. U. L. REV. 287 (1968).

313. 5 U.S.C. § 2302 (2006). The Act does not apply to sensitive government organizations such as the FBI, evidencing the greater strength the legislature places on the side of the government when balancing interests in areas relating to national security. *Id.* § 2302. More importantly, this statute and other similar federal protections signify that the government has already found that in the normal (not related to national security) public employment context, the balance tips in favor of employee interests in protection from discrimination. *Id.* § 2302.

314. *Id.* § 2302 (b)(1).

315. *Id.* § 2302 (b)(10).

316. *See Engquist*, 128 S. Ct. at 2156.

317. *See id.*

318. *Id.* at 2152.

319. *Id.* at 2157.

concern.[320] Furthermore, the Supreme Court has declared that "'the theory that public employment . . . may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.'"[321] Thus, a correct balance would have acknowledged that the government has an interest in maintaining control over its employment and personnel decisions, yet the employee has an even greater interest in not being subjected to something so unequivocally unreasonable as malicious or vindictive treatment.[322] In *Engquist*, the Supreme Court ignored its own cautions and held that public employers may subject employees to unreasonable, discriminatory treatment in its deference to at will employment, a concept that the government has already found to be worth limiting.[323]

C. Ill-Will Is the Key to a Workable Standard for Class-of-One Equal Protection Claims in the Public Employment Context Because It Will Lessen the Number of Claims and Reduce the Risk of Courts Encroaching on Employers' Discretion

One of *Engquist's* main justifications for rejecting class-of-one claims in the public employment context was that the purpose of the Equal Protection Clause was to prevent arbitrary classifications.[324] While this is true, the majority failed to acknowledge a second underlying purpose of the Equal Protection Clause: to protect individuals from discriminatory government treatment motivated by ill-will.[325] Requiring plaintiffs to show an element of ill-will will prevent a flood

320. *See* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 343–65 (1949) (discussing the history of the Court striking down cases for illegitimate purposes); *see also supra* Part II.C.

321. Keyishian v. Bd. of Regents, 385 U.S. 589, 605–06 (1967) (quoting Keyishian v. Bd. of Regents, 345 F.2d 236, 239 (1965)).

322. Waters v. Churchill, 511 U.S. 661, 671 (1994) ("[T]he propriety of a proposed procedure must turn on the particular context in which the question arises—on the cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase."). Many scholars have supported the idea that employers, even in the private employment context, should not be allowed to make vindictive employment decisions. *See* Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. Rev. 1816, 1817 (1980) (noting that at-will employment has "come under increasing attack by commentators" and proposing a "comprehensive economic rationale for judicial revision of common law rules" to provide employees with more protection); *cf.* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 951 (1984) (arguing that at-will employment is the most efficient type of employment relation); Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901, 1902 (1996) (arguing that employment at-will serves the needs of both employers and employees).

323. Engquist, 128 S. Ct. at 2156.

324. *Id.* at 2153.

325. *See infra* Part IV.C.1.

of class-of-one claims in the federal courts,[326] ensure the claims brought are substantively important,[327] and provide the Court with clearer means to distinguish unjust differential treatment in a subjective context.[328]

1. *Animus or Ill-Will Is One of the Core Concerns of the Equal Protection Clause*

The purpose of the Fourteenth Amendment was not just to prevent differential treatment, but also specifically to prevent differential treatment stemming from malicious motives.[329] Although ill-will is not always a necessary component of an Equal Protection claim,[330] it plays a significant role in discretionary Equal Protection cases.[331] Scholars have noted that animus constitutes one of the core prohibitions of the Equal Protection Clause.[332] The history of the Equal Protection Clause shows that courts adopted hierarchical classifications as a means to distinguish when ill-will was implicated in government legislation.[333] For example, classifications such as race and religion trigger a higher standard of review—strict scrutiny—because the presence of ill-will or malice is already implied, or at least extremely likely.[334]

Precedent clearly shows that when a plaintiff proves that ill-will was a contributing factor to an otherwise neutral government action, courts carefully consider the legitimacy of the action.[335] Even under the most deferential rational basis test, courts have struck down gov-

326. *See infra* Part IV.C.2.

327. *See infra* Part IV.C.2.

328. *See infra* Part IV.C.3.

329. *See* Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (finding that differential treatment resulting from normal use of discretion would be valid, but differential treatment drawn with an "evil eye" is invalid).

330. *See* Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000) (per curiam) (holding that a plaintiff alleging differential treatment regarding land use stated a valid class-of-one Equal Protection claim without reaching the theory of ill-will).

331. *See* McCleskey v. Kemp, 481 U.S. 279, 319 (1987) (upholding use of capital punishment despite its disparate effect on racial minorities because the plaintiffs did not prove a motive of ill-will); Washington v. Davis, 426 U.S. 229, 239–41 (1976) (noting that ill-will is the key to determining when a facially neutral law that has a discriminatory effect is constitutional).

332. *See, e.g.*, Araiza, *supra* note 238, at 506 ("[A]nimus . . . forms one of the underlying concerns of the Equal Protection Clause.").

333. *See Yick Wo*, 118 U.S. at 373–74 (articulating the distinction between improper and proper group classifications by defining improper classifications as those applied with an "evil eye and an unequal hand").

334. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

335. *See, e.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534, 538 (1973) (striking down regulations that prohibited food stamp recipients from living with unrelated people

ernment actions when there is proof of an underlying element of ill-will.[336] For example, in *Sioux City Bridge Co. v. Dakota County*[337], the first Supreme Court case hinting at a class-of-one Equal Protection claim, the Court emphasized that the case should be remanded for a finding of intent, for "mere errors of judgment do not support a claim of discrimination, but . . . there must be something more—something which in effect amounts to an intentional violation of the essential principle of uniformity."[338] At the same time, courts have often cited a lack of ill-will or vindictive motivation to justify the validity of laws having a disparate effect on different groups.[339]

When the Supreme Court considered *Engquist's* class-of-one claim, it focused on *Olech's* objective test of whether the plaintiff was intentionally treated differently from similarly situated persons and whether the differential treatment was wholly irrational or arbitrary.[340] Focusing on this standard, the *Engquist* majority reasoned that arbitrary, differential treatment in the public employment context is normal and even expected.[341] The Court then concluded that attempting to distinguish unjust differential treatment from just differential treatment would be impossible in that context and result in a flood of litigation.[342] The only time the *Engquist* Court even tangentially addressed ill-will was when the Court defined a class-of-one claim as "a claim that the State treated an employee differently from others *for a bad reason*, or for no reason at all."[343] However, because the Court cited cases holding that employers may not dismiss for incorrect information, the Court seemed to be using "bad reason" as a synonym for an "irrational" reason, not as a synonym for a "vindictive" rea-

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when the regulations were aimed at preventing the "hippie" community from receiving benefits).

336. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 634 (1996) (noting that laws based on sexual orientation "raise the inevitable inference that the disadvantage imposed is born of animosity").

337. 260 U.S. 441 (1923).

338. *Id.* at 447.

339. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 296–97 (1987) (finding that capital punishment is valid even though it has a disparate effect on blacks because there is no vindictive motive in the government's application of the punishment); Washington v. Davis, 426 U.S. 229, 247–48 (1976) (finding that a written test for police officers having a discriminatory effect on blacks was not unconstitutional because there was no motive to exclude black applicants).

340. Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000) (per curiam).

341. Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2154 (2008).

342. *Id.* at 2156.

343. *Id.* (emphasis added).

son.[344] Thus, the Court did not consider class-of-one claims under a standard requiring a showing of ill-will.[345]

While the *Engquist* majority correctly noted that many seemingly arbitrary employment decisions are nonetheless good-faith decisions, it failed to sufficiently address the difference between arbitrary or irrational employment decisions and decisions based on a purely malicious motive.[346] In a generally objective context, such as *Olech*, a wholly "irrational" or "arbitrary" decision would almost always indicate some illegitimate animus or ill-will.[347] Therefore, requiring a plaintiff to positively show ill-will would set class-of-one claims in the public employment context on the same level as other valid Equal Protection and class-of-one claims where ill-will can be implied.

2. *Requiring Plaintiffs to Show Ill-Will Will Reduce Litigation and Place Class-of-One Claims on a Level of Importance in Accord with Other Federal Cases*

One of the main reasons that the *Engquist* majority rejected class-of-one claims in the public employment context was that it feared that allowing such claims would flood the federal courts.[348] Although maintaining an efficient federal court system is a powerful interest, the Court did not need to categorically reject all class-of-one claims in public employment in order to protect the integrity of the federal courts. Adopting a more stringent test requiring a plaintiff to show that a malicious or vindictive motivation was the only reason for the government act would just as effectively preclude a flood of public employment class-of-one litigation because such a test would be very

344. *Id.* at 2155 (relying on cases stating that employers may constitutionally dismiss employees based on incorrect information).

345. *See id.* at 2155–56.

346. *Id.* at 2154 ("[T]reating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.").

347. Even though the Supreme Court found that the plaintiff in *Olech* did not need to claim ill-will, the discriminatory treatment was, indeed, based on ill-will. Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000) (Breyer, J., concurring). Thus, while ill-will might often be the underlying factor in these types of cases, the Engquist Court found that the plaintiff should not have to prove the underlying ill-will because the law presented a clear standard that should apply to everyone equally, and the defendant departed from that standard. *Engquist*, 128 S. Ct. at 2154.

348. *Engquist*, 128 S. Ct. at 2154 ("The practical problem with allowing class-of-one claims to go forward in this context is not that it will be too easy for plaintiffs to prevail, but that governments will be forced to defend a multitude of such claims in the first place, and courts will be obliged to sort through them in a search for the proverbial needle in a haystack.").

difficult for a plaintiff to meet.[349] Thus, plaintiffs would still be encouraged to seek the other possible remedies mentioned by the majority, such as anti-discrimination laws that "offer paths of lesser resistance than the constitutional claim under the Equal Protection Clause."[350]

The *Engquist* dissent would have applied a rational basis test without ill-will and still found that the plaintiff could have stated a valid claim for relief.[351] However, the dissent acknowledged that creating a proper Equal Protection standard in the employment context might require some "surgery" to the pure rational basis test to prevent the government from having to defend an overwhelming number of equal protection class-of-one claims.[352] Requiring class-of-one plaintiffs to claim that the defendant acted as a result of a vindictive motivation or ill-will might be the "scalpel" for which dissent was looking.[353]

3. Requiring Plaintiff to Show Ill-Will Would Provide the Court a Means for Distinguishing Valid Claims in a Subjective Context

Proof of ill-will helps to distinguish unjust differential treatment in public employment from differential treatment based on valid, dis-

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349. The *Engquist* majority noted that a purely arbitrary standard would be very difficult for plaintiffs in public employment to meet. *Id.* at 2157. A standard requiring a showing of ill-will would be even more difficult to meet. *See* Rubinovitz v. Rogato, 60 F.3d 906, 911 (1st Cir. 1995) (asserting that the bad faith standard "should be scrupulously met") (citation and internal quotation marks omitted); LeClair v. Saunders, 627 F.2d 606, 609–10 (2d Cir. 1980) (finding that the plaintiff had not sufficiently proven malice even if all six factors that he alleged were true). Although the ill-will standard could still result in some waste of federal resources if courts must engage in costly discovery before summary judgment, it is unlikely that plaintiffs with weak cases would bring claims under such a high standard.

350. Br. of Professor Richard Epstein and the Rutherford Inst. as Amici Curiae in Support of Pet. at 16 *Engquist*, 128 S. Ct. 2146 (No. 07-474).

351. *Engquist*, 128 S. Ct. at 2161 (Stevens, J., dissenting).

352. *Id.* at 2158. While the dissent applied the same purely rational basis (no ill-will required) test as the majority, the dissent found that there was no rational basis for the government's differential treatment of Engquist because the state did not offer any rational basis for its decision and, in fact, "explicitly *disclaimed* the existence of a workplace or performance-based rationale." *Id.* at 2158–59. The dissent stated that "[b]ut for this disclaimer" in which the government specifically stated there was no rational basis, the Court would have had the freedom to make up some rational basis of its own. *Id.* at 2159 n.2. Although this analysis fits the traditional rational basis standard, it would result in judicial waste because it would force the Court to address an overwhelming number of claims that could be easily dismissed by any flimsy offering of a legitimate purpose. *Id.* at 2157 (majority opinion). The ill-will requirement, however, would prevent plaintiffs from bringing suit unless they had clear proof of ill-will, and would allow plaintiffs to offer evidence contradicting the government's reasons.

353. *Id.* at 2158 (Stevens, J., dissenting).

cretionary grounds. *Ciechon v. City of Chicago*[354] poignantly illustrates that the presence of ill-will in an employment decision can make a class-of-one claim relatively clear cut.[355] In *Ciechon*, the city punished a career paramedic for failing to give a patient oxygen when doing so could have reasonably been the wrong medical choice.[356] Despite the fact that another paramedic was equally responsible for the care of the patient, the city submitted to the patient's family, who out of "grief . . . expressed in pointless vengeance" demanded that the city fire the paramedic.[357] In this case, the city's decision was clearly tied to the family's hatred of the plaintiff, and the employees were so closely situated that they should have expected an objective application of policy.[358]

Thus, instead of rejecting all class-of-one claims, the *Engquist* Court should have found that when there is a discretionary context, courts must find that malicious reasons were the motivation for the government action, and that there was no rational reason.[359] Requiring the plaintiff to assert ill-will would be in accordance with the fact that prior cases have "blurred the once sharp distinction" in Equal Protection analysis between strict scrutiny, which almost always invalidates the government act, and rational scrutiny, which almost always allows the government act.[360] Although a pure rational basis test in the public employment context would almost always turn on the side of the employer, who could come up with a hypothetical legitimate reason for any employment decision, a requirement of ill-will would create a flexible middle ground in which some of the worst cases could be addressed. As discussed earlier, decisions in the employment context may indeed be objective.[361] The more closely situated, the more reason the Court has to believe that individuals should be

354. 686 F.2d 511 (7th Cir. 1982).

355. *Id.* at 516–17 (stating that the Court had "no difficulty" in finding a valid class-of-one claim in public employment).

356. *Id.* at 519–20.

357. *Id.* at 515–16.

358. *Id.* at 516–17.

359. *See* Palmer v. Thompson, 403 U.S. 217, 224–25 (1971) (finding that a city could shut down its public pools instead of desegregating, despite the strong likelihood of a malicious motive, when there were other legitimate reasons for the actions). This test is very similar to the first prong of the test for class-of-one claims suggested by Nicole Richter. Nichole Richter, Note, *A Standard for "Class of One" Claims Under the Equal Protection Clause of the Fourteenth Amendment: Protecting Victims of Non-Class Based Discrimination From Vindictive State Action*, 35 VAL. U. L. REV. 197, 255–63 (2000). However, Richter's test would apply to all class-of-one claims, *id.* at 257, whereas the test proposed in this Note would only apply to class-of-one claims in public employment or other fairly subjective contexts.

360. SEIDMAN, *supra* note 238, at 245.

361. *See supra* Part IV.B.1.

treated equally.[362] Within the employment context, very similarly situated plaintiffs in addition to a clear showing of ill-will would be enough to create a valid Equal Protection claim.[363] The plaintiff would still have the burden of negating any legitimate government reason for the allegedly discriminatory action, because once the government asserts a rational basis for its conduct, the burden is on the plaintiff to show that the asserted basis is in fact a pretext for an illegitimate purpose.[364]

V. CONCLUSION

In *Engquist v. Oregon Department of Agriculture*, the Supreme Court unnecessarily removed all public employment class-of-one claims from the scope of the Equal Protection Clause.[365] In doing so, the Court applied a purely arbitrary test and did not require a showing of ill-will, as many lower federal courts had done in subjective class-of-one contexts.[366] The failure to require proof of ill-will led the Court to conclude that class-of-one claims in the public employment context are not viable.[367] In rejecting all class-of-one claims in the public employment context, however, the Court ignored its trend of recognizing individual Equal Protection rights, particularly in challenging malicious government acts.[368] While it is true that the public employment context is more subjective and complex than the explicitly accepted class-of-one contexts of taxation and land use, that does not excuse courts from their judicial duty to determine whether a plaintiff's constitutional rights have been violated.[369] Because a stringent test would

362. *See* Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886) (finding misuse of discretion in denying Chinese applicants permits when they met the same precautions as other applicants for wooden laundry buildings).

363. Professor Robert Farrell notes that there were two types of class-of-one claims prior to (and following) *Olech*: the pure "similarly situated" claims (no subjective intent needed) and the "vindictive action" claims (no similarly situated person needed). Farrell, *supra* note 286, at 405. *Olech* did not overrule the vindictive action claim, it just found it unnecessary in the objective context of land use regulation. Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000) (per curiam). The problem with Chief Judge Posner's rejection of the *Olech* test ignoring ill-will was that Posner did not clarify that different standards apply in subjective versus objective contexts (or where the plaintiffs are more or less similarly situated). *See* Hilton v. City of Wheeling, 209 F.3d 1005, 1008 (7th Cir. 2000), *cert. denied*, 531 U.S. 1008 (2001).

364. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448–50 (1985) (rejecting a city's proposed legitimate reasons for denying a housing permit to a group home for the mentally retarded).

365. *Engquist*, 128 S. Ct. at 2156.

366. *Id.*

367. *Id.*

368. *See supra* Part IV.A.

369. *See supra* Part IV.B.

meet all of the Court's concerns regarding application of the Equal Protection Clause in the public employment context, the Supreme Court should have applied a test requiring the plaintiff to show that the government employer was motivated by ill-will, in addition to having no rational reason for his decision.[370]

370. *See supra* Part IV.C.